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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 172.

ERIC G. KAUFMAN AND AENNI C. KAUFMAN, *Petitioners*,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC.

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian, GEORGIA NEESE CLARK, Treasurer of the United States, and REMINGTON RAND, INC., *Respondents*.

BRIEF FOR RESPONDENT SOCIETE INTERNATIONALE POUR PARTICIPATIONS, ETC.

ROGER J. WHITEFORD,
JOHN J. WILSON,
Attorneys for Respondent, Societe Internationale, etc.

Of Counsel:
PEIDER KONZ

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BRIEF FOR RESPONDENT SOCIETE INTERNATIONALE POUR PARTICIPATIONS, ETC.

STATEMENT.

This respondent, a Swiss corporation, on October 21, 1948, filed an action in the District Court at Washington, D. C. under Section 9(a)[1] of the Trading With the Enemy Act against the appropriate government officials to recover property vested by the Alien Property Custodian. (R. 1). This property consists of cash and about 93% of the capital stock of General Aniline & Film Corporation, a Delaware corporation, having its offices in New York and its

[1] See Appendix, *infra*.

factories in New York and New Jersey. All right, title and interest in the property reposed in the respondent corporation.

Respondent alleged in its complaint that it was not and is not an enemy or ally of enemy within the purview of the Trading With the Enemy Act. This, of course, is its primary contention in the litigation. On the other hand, the Government contends that the corporation is enemy or enemy-tainted by reason of the conduct of its management; it is not claimed that this respondent is tainted by reason of entire or even majority stock ownership by enemies. (R. 28).

Petitioners, claiming to be "non-enemy" or "non-enemy-tainted" stockholders of the respondent-corporation, holding eighty-six shares, and further claiming to represent a class of such stockholders,[2] assert that by virtue of certain hypothetical language of this Court in the *Uebersee*[3] case, they can recover a portion of the vested property of this respondent equal to the stock interest of the so-called "non-

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[2] In footnote 6 on page 3 of petitioners' brief it is stated that "non-enemy" shareholders owning over 11,000 common shares out of a total of approximately 140,000 outstanding have filed an affidavit (R. 69) supporting petitioners in their attempted intervention. For sake of accuracy, the outstanding fully-paid common shares approximate 206,000 of which General Aniline & Film Corporation held about 56,000 on the date of vesting—February 16, 1942. In the above-referred to affidavit, the affiant stated (R. 71) that the so-called "protective committee" (affiant's company) intended "formally to become party to said intervention or to intervene independently in such manner as is deemed appropriate, at the earliest opportunity." Despite this statement, neither the company calling itself a "protective committee," nor any subscriber thereto has attempted to intervene. Is it because the various owners of the alleged 11,000 shares acquired them after February 16, 1942? Their identities have not been disclosed, except that the "protective committee" company says it owns 25 shares (R. 70). This company cannot establish ownership as of February 16, 1942.

[3] *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 489, "* * * what part of a friendly alien corporation's property may be retained when only a fractional enemy ownership appears, are left undecided."

enemy" stockholders, even if the respondent-corporation should be denied recovery of *all* such property upon the ground that it is "enemy" or "enemy-tainted."

Petitioners seek to intervene in respondent-corporation's suit, their theories of intervention being as follows:

(1) That under Rule 24(a)(2) of the Federal Rules of Civil Procedure, and under the case of *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, they may intervene "derivatively" to have the corporation assert their alleged proportional claim;

(2) That under Rule 24(a)(3) they may intervene directly—that is, as individuals—to assert such claim, upon the ground that they have an interest in the vested corporate property; and

(3) That there is a "class" of "non-enemy" stockholders, and petitioners represent them in the attempted intervention.

The Court of Appeals' opinion held that petitioners did not come within either clause of Rule 24(a), and affirmed the District Court's denial of intervention. (R. 79-81). It is reported in 188 F. 2d 1017. District Judge Tamm's opinion is not reported. It may be found in the Record at pages 74-76.

Petitioners do not wish to intervene to support the effort of the respondent corporation to recover *all* its property; nor do they find any fault with the conduct of the litigation in this objective. They wish to sponsor in the name of the corporation a secondary position, namely, that if the corporation cannot recover all, then at least it can recover a portion of the vested property commensurate with the interest of the so-called "non-enemy" stockholders in the respondent corporation, e.g. if the "non-enemy" stockholders equal 75% of the respondent corporation, then the Government may retain only 25% of the vested corporate property. However, petitioners qualify this secondary po-

sition by stating that the recovery would be for the direct benefit of the "non-enemy" stockholders and not for the corporation as a whole. It is this qualification and the effects thereof, this respondent submits, which destroy the derivative character of the present proceeding and which demonstrate the individual nature of petitioners' objective. This being so, the instant effort at intervention must fail and petitioners must be left to their independent proceeding which they have filed in New York[4] and which will afford them the opportunity to obtain individual relief, if any exists.

SUMMARY OF CONTENTIONS OF PETITIONERS AND THIS RESPONDENT.

Petitioners strive to convince the Court that, by their intervention, they will proceed derivatively;—that the right to partial recovery is in the corporation. Thus, they seek intervention under Rule 24(a)(2) of the Federal Rules of Civil Procedure.

They also invoke Rule 24(a)(3) of the Federal Rules of Civil Procedure, but one cannot believe that petitioners are really serious in this respect, since this rule cannot be invoked for derivative action, and petitioners cannot hope to get into the corporation's suit in an "individual" capacity to assert some right, title or interest in the vested property antagonistic to the corporate claim, or in the event

[4] On March 9, 1950, five days before the original motion was filed in the trial court for leave to intervene, these same petitioners instituted in their own individual behalf, in the United States District Court for the Southern District of New York, a civil action under Section 9(a) against the Attorney General as successor to the Alien Property Custodian, seeking a decree adjudging that they are entitled to the ownership, possession and enjoyment of their proportionate share of the property and funds of this respondent seized by the Alien Property Custodian. (R. 83-86) The defendant therein moved to dismiss such action upon the ground that it failed to state a claim upon which relief could be granted. Judge Samuel Kaufman denied this motion, and the case has been calendared for trial upon the Custodian's answer.

that the corporate claim is not permitted to prevail. Surely, a stockholder, as such, can have no claim upon property in which his corporation has no right, title or interest.

One thing seems absolutely certain, namely, if neither of the above-mentioned rules affords petitioners an avenue of entrance into this case, no amount of argument *generally* can gain admittance for them. They refer disdainfully to procedural hurdles (Pet. br. 37) and technical objections (Pet. br. 43) to their attempted intervention. But their appeal is being addressed to the Court which made the Rules and which thereby, in effect, informed courts, lawyers and litigants that one may intervene in a pending case according to certain prescribed methods, or not at all.

Petitioners rest their case upon three propositions, all of which, this respondent submits, are erroneous, namely: (1) A derivative action may be maintained against a third party for the direct and personal benefit of *some* of the corporation's stockholders; (2) a corporation may be "enemy" or "enemy-tainted" to a certain extent, and at the same time "non-enemy" or "non-enemy-tainted" to a certain extent, within the purview of Section 9(a) of the Act; and (3) so-called "non-enemy" stockholders may recover their aliquot share in vested corporate assets in the statutory proceeding against the United States after it has been determined that the corporation, as owner, cannot succeed in recovering back *all* of the vested property.

To give color to their contentions, petitioners have adopted the approach of charging that the management of respondent corporation has not acted in good faith and is motivated by personal and financial self-interest in their opposition to the present effort of intervention; and, also, that the management has violated its fiduciary duty in seeking, as it is, recovery for the benefit of all, instead of, as petitioners urge, recovery for the benefit of some.

This respondent contends that its loyalty is to the *whole* corporation—to all of its stockholders, including the peti-

tioners, and not merely to some.[5] And this loyalty it is scrupulously adhering to and respecting. Indeed, there is no duty known to the law to urge the individual and conflicting claims of one group as against another. Moreover, from a purely legalistic standpoint, it is this respondent's belief that it would commit "legal" suicide if it adopted petitioners' contention that the corporation can be partly "good" and partly "bad" under Section 9(a). Respondent does not shrink from such a position merely because of inconsistent causes of action. It fully realizes that such are permitted under rules of practice. Instead, respondent feels that such a move would require the statement of an alleged statutory cause of action which would conflict with the statute itself. The entire theory of petitioners' cause of action is that the corporation is "enemy-tainted." If this were not so, the intervention would be unnecessary even from petitioners' point of view; and if it be so, then the corporation has no standing under Section 9(a).

This respondent maintains that petitioners have no right to intervene under either F. R. C. P. 24(a)(2) or 24(a)(3); that they are not asserting a corporate right, but one which is individual in character; and that there is no definable class of "non-enemy" stockholders which petitioners or the corporation could represent.

ARGUMENT.

The fiduciary duty of the corporate management is to all of its stockholders. That duty is being discharged in the main action in which recovery is sought of all the vested property. The interest of the petitioners, like that of all other stockholders, is fully and adequately represented in the main action.

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[5] Petitioners' reasoning becomes quite confused on page 7 of their brief, where they state: "Notwithstanding its fiduciary obligation to the corporation *as a whole* and to its non-enemy stockholders * * *." (Italics supplied) Under petitioners' own theory, these interests are not reconcilable.

The sponsoring of separate and individual claims for the petitioners by the corporation is not based on any fiduciary duty known to the law. To assert such a claim would not only violate the management's duty to all shareholders but would also undermine the basis of the corporation's claim that it is not an enemy. The duty to all shareholders is violated because to assert petitioners' claim is to pit one group of shareholders against another when the fiduciary duty is to represent all. The corporation's claim is undermined because the separate and conflicting claim of the petitioners is necessarily premised upon an allegation that the corporation is enemy or enemy-tainted and is therefore not entitled to recover under Section 9(a).

Rule 24(a)(2) Does Not Afford a Basis for Intervention.

Intervention under F. R. C. P. 24(a)(2)[6] turns upon whether the present attempt is truly derivative. This respondent readily concedes that this is the provision by which stockholders ordinarily intervene in a pending action (in which their corporation is either plaintiff or defendant) for the purpose of asserting a *corporate* claim or defense not already asserted by the management.

In such cases, naturally, intervention is the only opportunity afforded the shareholder to litigate the point which he seeks to maintain. If he permits the chance to pass, he is thereafter estopped. Hence, the applicability in proper circumstances of the latter portion of Rule 24(a)(2)—"and the applicant is or may be bound by a judgment in the action."

But, if the right which is being asserted is not corporate in character, and, instead, is individual, then petitioners

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[6] This provision reads as follows:

"(a) Upon timely application anyone shall be permitted to intervene in an action: * * * (2) When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *."

—if they have such right—would not be bound by a judgment against the corporation. This is both elementary and axiomatic.

This Court has said that "a derivative action is a suit by a shareholder to enforce a corporate cause of action." "And the relief that is granted is a judgment against a third person in favor of the corporation." *Price* v. *Gurney*, 324 U. S. 100, 89 L. Ed. 776. See, also, *Davenport* v. *Dows*, 18 Wall. 626, 21 L. Ed. 938, and *Meyer* v. *Fleming*, 327 U. S. 161, 90 L. Ed. 595.

But petitioners do not seek relief for the corporation. They seek it for themselves personally and individually. They want to recover the aliquot share of the so-called "non-enemy" stockholders, not for the corporation, but for the direct benefit and use of such stockholders.

They invoke a line of cases[7] to support the proposition that a derivative action may be for the benefit of *some* of a corporation's stockholders. In these cases the corporation was not disqualified from recovery; it was merely a matter of expediency and convenience that recovery was permitted directly in favor of plaintiff-stockholders.

This distinction is decisive for our purposes. We reiterate the key-note of our position in this brief. Petitioners seek to assert the cause of action which they sponsor only after—and because—the "enemy taint" of the corporation —disqualification under Section 9(a)—shall have been established.

To support our position that there can be no doubt that petitioners are interested only in the "non-enemy" stockholders—not in the corporation, and that they seek return of a portion of the vested property for *their* benefit, and *only* for *their* benefit, attention is directed to the third para-

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[7] (Pet. br. 42) *Matthews* v. *Headley Chocolate Co.*, 130 Md. 523, 100 Atl. 645; *Backus* v. *Finkelstein*, 23 F. 2d 357 (D. Minn. 1927), app. dismissed 31 F. 2d 1011 (C. C. A. 8, 1929), and *Brown* v. *De Young*, 167 Ill. 549, 47 N. E. 863. See the contrary rule in *Keenan* v. *Eshleman* (Del.), 2 A (2d) 904, 120 A. L. R. 227, and the Note following this case in 120 A. L. R. 236

graph of the prayers for relief at the end of the amended complaint in intervention (R. 67), and pages 42-43 of petitioners' brief. While there seems to be some effort to "play down" the language in this respect in their brief in this Court, as compared with their earlier statements in the case,[8] the fact remains, and we have no doubt that petitioners would frankly admit it, that their intervention is to benefit only the "non-enemy" stockholders and not the corporation. The several methods proposed by petitioners for handling the matter all end up with the same result of favoring this so-called class of stockholders and not the corporation.

This Court recently had occasion to deal with an effort to intervene under the same rule in *Sutphen Estates* v. *United States*, U. S. , 96 L. Ed. Adv. Op. #1, page 4. Similarly to this respondent's contention here, this Court said: "The decree in this case * * * therefore is not res judicata of the rights sought to be protected through intervention."

In the case at bar, the asserted rights being in reality "individual" and not corporate, a decision against the corporation cannot foreclose them. Petitioners' claim cannot be considered to be presently embraced within the instant complaint in the statutory action, since it would run counter to the statute. The court below stated: "If they have a right to a share of the vested property, they cannot be deprived of it in a suit to which they are not parties."

The case of *Standard Oil Co.* v. *Clark*, 167 F. 2d 917 (C. C. A. 2, 1947), Cert. denied 333 U. S. 873, is strongly relied upon by petitioners. It is invoked for two purposes, one being to support the idea of segregating "enemy" and "non-enemy" owners of vested property, and the other being to give color to their contention that a corporation

[8] In petitioners' brief in the Court of Appeals, they stated as a part of the "Question Presented" that they were entitled to intervene "To assert that the corporation is entitled to the return of the non-enemy proportionate interest in the vested property, for the benefit of its non-enemy shareholders."

may be enemy *to the extent* of its enemy stockholders and non-enemy *to the extent* of its non-enemy stockholders.

The separation which was made in the *Standard Oil* case is far different from the problem which petitioners try to present to this Court in the case at bar. In that case, intermixtures of enemy and non-enemy ownership were capable of separation on the basis of direct ownership by Americans and Germans, respectively, while here, petitioners seek to have the Court separate, and release to them as their own property, vested corporate assets in which they have neither a direct nor recognizable separable interest.

Reliance by petitioners upon the phrase "to the extent," which is found in Executive Order 8389, and which was dealt with by the Circuit Court of Appeals in the *Standard Oil* case in quite an indirect fashion, reflects the extreme reasoning which petitioners must employ in an effort to support their present contentions. The manner in which Circuit Judge Clark referred to the "Executive definition of foreign national" easily demonstrates that he was not using the phrase "to the extent" as a modification or expansion of the definition of "enemy" under Section 9(a).[9]

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[9] With even less merit, petitioners have included a chapter in their brief (pp. 26-36) entitled "Executive and Legislative Developments." Instead of aiding petitioners, this chapter establishes the opposite of anything which would support their theories. They refer to the "IARA" Agreement (The Agreement Relating to the Resolution of Conflicting Claims to German External Assets, 18 State Dept. Bull. pp. 6 *et seq.*), to House Joint Resolution 516, to statements of officials of the Office of Alien Property, to the President's veto of a private bill (H. R. 8422, 81st Cong. 2nd Sess.), and to legislation that was pending in the 81st Congress and is pending in the instant (82nd) Congress. None of these references aids petitioners in their present effort to have this Court construe the Trading With the Enemy Act, *as it now stands*, in a manner favorable to their position.

The "IARA" Agreement is obviously not designed to modify the Trading With the Enemy Act by bestowing any justiciable rights; that is to say, its objectives are to be achieved administratively on the international level, and are not intended to modify existing municipal law. (See Article 33 of the Annex to the Agreement) Also—and this is directly controlling—petitioners

Rule 24(a)(3) Has No Application Here.

Should petitioners fail to intervene derivatively under Rule 24(a)(2) because their claim is *not* a corporate one, they then invoke Clause (3) of the same rule[10] upon the theory that they would be personally adversely affected by a disposition of the vested property as the result of a decision against the corporation.

As the Court of Appeals pointed out in its decision below, this clause of the Rule contemplates that the person having the right of intervention should have a legal interest in the property.[11] The Court then proceeded to demonstrate, by citation of decisions of this Court, that a stockholder has

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were obliged to admit on page 34 of their brief that in the execution of the "IARA" Agreement, the United States delegation expressly reserved that its provisions should not apply to the subject matter of the instant case.

Petitioners' theme seems to be that the legislative efforts have not been for the purpose of conferring new rights, but, instead, they are designed to simplify procedures in relation to existing ones. Reference to the President's veto of H. R. 8422 (Pet. br. 30-31) is an immediate and powerful contradiction of this contention. The President, in his veto message, expressly recognized that there is no remedy under present statutes for the situation which confronts petitioners. He speaks of exactly the problem which exists here.

The bills which were pending in the 81st Congress, and whose counterparts are pending in the 82nd Congress, all demonstrate that it is not merely a matter of clarifying the present state of the law, but that it is considered that there is presently a total absence of statutory support for petitioners' contentions.

[10] This provision of the rule is as follows:

> "(a) Upon timely application anyone shall be permitted to intervene in an action * * * (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof."

[11] *Pure Oil Co.* v. *Ross*, 170 F. (2d) 654 (CCA 7, 1948); *Dowdy* v. *Hawfield*, —— U. S. App. D. C., 189 F. 2d 637; *United States* v. *Columbia Gas & Electric*, 27 F. Supp. 116 (D. C.) D. Dela., 1939); *Cf. Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. 2d 940 (C. A. 4, 1933); *Cross* v. *Missouri & A. Ry.*, 74 F. Supp. 242 (D. C., W. D. Ark., 1947); *In re Bender Body Co.*, 6 F. R. S. 379 (D. C., N. D. Ohio, 1942).

no such interest in the corporate property.[12] We agree with all that has been said by the lower court and urge these propositions upon the Court at this time, but there is another reason, even more peculiarly applicable to the case at bar, which makes it impossible for petitioners to intervene under Clause (3).

If the corporation is "enemy-tainted," its present action fails, and the corporation loses all right, title and interest in the vested property. If the corporation no longer has an interest in the property, then surely its stockholders would not have even an expectancy in liquidation. It is just the same as where corporate property is lost through mortgage foreclosure or judgment execution. There is no property against which the claim of interest can be asserted, even if one assumes the claim to be a valid one.

Clause (3) of the Rule also requires that the one seeking intervention shall be "adversely affected" by the outcome of the main proceeding. See *Sutphen Estates* v. *United States*, *supra*. Petitioners cannot be so affected in view of the pendency of their New York action in which their individual interests are being asserted. And it will be remembered that that action draws to it sufficient of the vested property to satisfy petitioners' claim there.[13]

In view of all of the foregoing, it seems clear, as this Court stated in the *Sutphen* case, that petitioners have "not maintained the burden of showing that under Rule 24(a)(3) it [they] may intervene as of right."[14]

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[12] *Donnell* v. *Herring-Hall Marvin Safe Co.*, 208 U. S. 267, 277; and *Klein* v. *Board of Supervisors*, 282 U. S. 19, 24. See also, *Eisner* v. *Macomber*, 252 U. S. 189, 208; *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69, 81; *First National Bank* v. *Maine*, 284 U. S. 312, 329-330; and Moore's Federal Practice (Second Edition) Paragraph 24-09 (pp. 45-46 of Vol. 4).

[13] Section 9(a) of the Act provides that if suit be instituted, such property as is sought to be recovered shall be retained by the Government officials until final disposition of the case by the court.

[14] There is no other basis for intervention available to petitioners. It is not clear whether petitioners continue erroneously to rely upon *Missouri-Kansas Pipe Line Co.* v. *United States*, 312

The Idea that There is a "Class" of "Non-Enemy" Stockholders is a Fiction Created by Petitioners for the Purpost of Their Present Attempt to Intervene. There Is No Such Class.

The matter of a "class" of "non-enemy" stockholders arises in two ways upon the instant effort at intervention. One has to do with the representative character of petitioners' move, and the other with the group of beneficiaries under petitioners' theory of derivative corporate action.

As to the former, petitioners' attempted representation of a "class" of "non-enemy" stockholders must arise in connection with the assertion of "individual rights"—thus under Rule 23(a) and the third clause of Rule 24(a); and not in relation to the derivative action which they claim the corporation can maintain. Because of this, not only must the usual prerequisites of a class action be present, but the objections to intervention as individuals—elsewhere herein discussed[15]—equally apply to the intervention of the so-called class.

The other phase of the "non-enemy class," arising from petitioners' theory that the corporation has a cause of action for such a group of its stockholders, and that, in effect, there is a composite mass or unit of them, while not tested

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U. S. 502, as an independent ground for intervention. They did this in the two lower courts, urging that this Court recognized a right of intervention not arising from Rule 24. That the case has a very narrow scope, bottomed entirely upon the consent decree involved therein, is clearly stated by the Court in *Allen Calculators* v. *National Cash Register Co.*, 322 U. S. 137, 141, 89 L. Ed. 1188, 1191, where the Court said:

> "The appellant relies upon *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 85 L. Ed. 975, 61 S. Ct. 666. That case, however, is to be distinguished. There the applicant on whose behalf intervention was asked was named in the original decree as one who should be heard in respect of its property rights in the event certain action was taken. Such action was taken and, despite the terms of the original decree, intervention was denied. * * *"

[15] Lack of legal interest in the property; and absence of corporate property after defeat of the corporation.

by the prerequisites of a class action, corroborates very convincingly our argument that there is no corporate right or objective involved, but instead that there may be many individual claims, but less, however, than the totality of the stockholders.

Aside from the arguments made elsewhere as to why, on the one hand, intervention as an individual is impossible, and, on the other hand, the action is not truly derivative, the chaos which would follow if either of petitioners' theories were permitted to prevail in the proceeding is, this respondent submits, more than adequate to destroy such theories. This will be discussed in the following, sometimes in relation to the representative action, sometimes as to the alleged corporate right, and sometimes generally.

In the lower courts, and in opposition to the petition for certiorari in this Court, this respondent pointed out that there is no unified class of "non-enemy" stockholders, such as exists when one refers to "common" or "preferred" stockholders. In other words, the mere ownership of common or preferred shares in a corporation is the complete key to the latter classification, while in the case of so-called "enemy" and "non-enemy" stockholders, the personal and individual status of the stockholder himself is the test.

This respondent argued from the foregoing that not only could there be no class action because of this situation, but that the present issue of whether the corporation is "enemy" or "non-enemy" would be transformed into multitudinous issues as to whether each stockholder was "enemy" or "non-enemy". Also, that the allowance of intervention in favor of "non-enemy" stockholders, or even to sponsor a corporate claim in their behalf, would create an inherent antagonism. There would be no reason why the so-called "non-enemy" stockholders would support the corporate claim for the return of all the vested property; in fact, it can easily be visualized that if the "non-enemy" stockholders should be given a place in the corporation's lawsuit, such stockholders, in anticipation of personal re-

covery to the full extent of their aliquot share in the respondent corporation, would abandon the side of the corporation and be interested only in the speedy establishment of their own eligible status. Viewing the situation as one in which the corporation is also sponsoring the right of the "non-enemy" stockholders, the litigation would fast disintegrate into a "free-for-all" in which the corporation would find itself not only in conflict with the so-called group of "non-enemy" stockholders, but on that account, as well, in conflict with itself.

In view of these contentions on this respondent's part, petitioners urge, on page 43 of their brief, that under the *Uebersee* case, the respondent corporation "might be placed under the burden of proving the enemy or non-enemy character of its shareholders" and that, therefore, the burden after intervention would be no greater than before. In this respect petitioners misconceive the issues raised between the corporate respondent and the United States in the main proceeding. An examination of the first separate defense (R. 28-30) discloses that the Government does not contend that the respondent corporation is entirely owned by "enemy" stockholders, or that the status of every stockholder has been put in question. It is only the stockholdings of the so-called Sturzenegger-Baslé group (the management) whose ownership or control by I. G. Farben is charged. There are approximately three thousand stockholders in the respondent corporation. In the *Standard Oil* case, where, as here, the management of the corporation was charged with having dealings with I. G. Farben, surely no one ever dreamed of the absurd idea that the burden was placed upon the Standard Oil Company of New Jersey to establish the non-enemy status of the thousands of its stockholders.

It is suggested on page 41 of petitioners' brief that "for proper judicial administration" the principal action should be both the locale and the medium for the disposition of the claim which petitioners espouse. Of course, this is the rea-

son ordinarily for a class action, but here again petitioners cannot ignore or overlook the prerequisites of such an action. In addition to the fact, as petitioners admit on page 44 of their brief, that the *other* shareholders did not file claims as required by Section 9(a) as a condition precedent to the institution of suit, nor did they file suit within the limitations period prescribed by Section 33 of the Act, there is no class, in the sense of persons similarly situated, within the purview of Rule 23 of the Federal Rules of Civil Procedure. See *Moore's Federal Practice* (Second Edition), § 23.04; and compare the facts in *Mitchell* v. *Wright*, 62 F. Supp. 580 (D. C., N. D. Ala. 1945), reversed on other grounds, 154 F. 2d 924, cert. denied 329 U. S. 733.

This case is not like one where a number of gasoline retailers joined in a class action against the large oil companies to recover treble damages for conspiracy under the anti-trust laws (*Weeks* v. *Bareco Oil Co.* (C. C. A. 7th, 1941) 125 F. 2d 84); nor where a railroad negligently sets fire to property and widespread damage to many property owners ensues (*Moore's Federal Practice* (*Second Edition*), § 23.10 (page 3443). In such cases, the gravamen of the action—common to all—is the conduct of the defendant—conspiracy or negligence, and the variations in damages of the several plaintiffs are merely incidental; while in the case at bar, there is no similar common situation, but instead the separate status of each of the plaintiffs is the important and determinative element.

And, from the viewpoint of petitioners' theory that the right is a corporate one, the corporation would be obliged to litigate successively the personal status of each of the so-called "non-enemy" stockholders. In this connection, the burden would rest upon the corporation to establish this proof. How would it be procured? This respondent's shareholders are not only in Switzerland and the United States, but in many of the other nations of the world. If the responsibility is that of the corporation, how will it go about establishing the so-called "non-enemy" status of

every member of the alleged "class"? Surely, it could neglect none. And lack of cooperation of the shareholder or his unavailability should not excuse the corporation from the duty which petitioners would impose upon it, for it must be remembered that petitioners call it a "corporate" claim.

Take, for example, the status of the petitioners in this case, Mr. and Mrs. Kaufman. They point out in footnote 9 on page 6 of their brief that they were German in 1940; they imply that they were stateless when war broke out between the United States and Germany; and they say they are now American citizens,—doubtless so after February 16, 1942, the date of vesting. Petitioners say, on page 6 of their brief, "that it is unquestioned that the petitioners and other non-enemy shareholders similarly situated have no connection with the management group." It may be said that this is "unquestioned" only because the occasion for the Government to raise the question has not occurred. This respondent does not impute an "enemy" status to the petitioners, any more than it does to itself, but if it be enemy—which is vigorously denied—natural questions occur, such as: Did the Kaufmans send proxies from year to year to the management of the corporation? Did they know of and ratify courses of conduct which are now complained of by the Government as indicative of enemy taint on the part of the corporation? Did they purchase their stock when they resided in Germany because of the historical relationship formerly existing between this respondent and I. G. Farben? These and many other questions may be asked of members of the so-called "non-enemy" class of stockholders. Also, it is quite possible that an individual stockholder might be tainted by reason of some personal relationship with Germany or Japan. No one can defend against this but the individual himself. When one refers to such things, the idea that a corporate right is the medium for their litigation becomes quite untenable.

And so the result is that instead of the main corporate proceeding providing the "proper judicial administration"

for petitioners' claims, whether they be *called* individual, representative or corporate, the allowance of intervention would inevitably transform an already complex lawsuit into a confusion and an impossibility which would only tend to bring the orderly administration of justice into disrepute.

We do not make these arguments as if the intervention which is sought were discretionary, but because they help to demonstrate that the bases for intervention as a matter of right are being distorted or misapplied by petitioners in their present effort.

Petitioners Cannot Intervene to Prevent a Settlement Between Respondents.

Despite their effort to make a distinction,[16] the reasons hereinbefore discussed which defeat petitioners' right to intervene either for the corporation or individually, equally defeat their effort to prevent a settlement between the parties. Actually, the latter is a corollary of the former.

There is not here presented the typical situation where a shareholder intervenes derivatively to block a settlement which is the result of fraud and collusion between his corporation and other parties to the litigation. See *Pyle-National Co.* v. *Amos,* (7th Cir.) 172 F. 2d 428. In that case the intervention was for the purpose of preventing a compromise that would hurt the corporation, and not, as here, one that it is claimed would hurt a group of stockholders.

Petitioners make no contention that the corporation, as such, would suffer from the proposed compromise. They go even further and admit (Pet. br. 46-47) that "the non-enemy shareholders might not have the standing to object if it were not to be at their expense." How could they more forcefully emphasize the personal and individual in-

[16] Pet. br. 46: "However, in considering whether intervention is essential to prevent an improper and illegal settlement, it is unnecessary to determine whether the corporation or the individual shareholder is the proper claimant."

terest of the stockholders as distinguished from the protection of the corporation as a whole?

And petitioners explain what they mean by repeating their main position, namely, that the "non-enemy" stockholders are entitled to receive their aliquot share in full, undiminished by (1) a compromise which would necessarily be less ratably, and by (2) the inclusion of so-called "enemy" stockholders of the respondent-corporation.[17]

Here, again, the test is whether petitioners may intervene under clause 2 or clause 3 of Rule 24(a),—whether the move is derivative or whether it is individual. There is no other basis available to petitioners. It cannot be the former because the objective is not corporate benefit, as petitioners so clearly have demonstrated by the manner in which they state the proposition; and while this respondent submits that it is not individual for the reasons hereinbefore stated, if it should be so, then the New York proceeding is ample protection for petitioners. As we pointed out on page 12 *ante*, so much of the vested property as equals petitioners' proportionate interest in the respondent-corporation must be held intact to await the outcome of that action.

But petitioners will reply that members of their "class" have not filed separate 9(a) proceedings, and therefore are not as protected as they are. The answers are twofold: (1) There can be no class action here, as we have hereinbefore shown; and (2) we submit that there is no individual interest in the corporate property, but if there should be, the members of the "class" had recourse similar to that

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[17] Regarding petitioners' emphasis upon the 11% ownership of stock of this respondent by Germans (Pet. br. p. 6), the Court is reminded that under the Swiss-Allied Agreement of 1946, sometimes called the "Washington Accord" (14 State Dept. Bull. 1101-2, 1121-24)—referred to by petitioners in footnote 16 on page 35 of their brief—such German shares are subject to liquidation through the Swiss Compensation Office in such way that the Allies (United States, United Kingdom, France, etc.), will receive fifty percent of their value, and the Government of Switzerland the other half. Consequently, it is not possible for such shareholders to receive the benefit of such compromise.

pursued by petitioners, and if the statute of limitations (Section 33) bars them, they cannot complain about the absence of individual recourse.[18]

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[18] The respondent-corporation is accused by petitioners of misleading the "non-enemy" stockholders (Pet. br. p. 44), and of indulging in a course of conduct "designed to prevent the non-enemy stockholders from protecting themselves heretofore in any other fashion." (Pet. br. p. 45). There is not a word in the record of this case to justify or support these statements, and they are not true in fact. The *Uebersee* case was decided by this Court in December, 1947, and the corporation's action was filed in October, 1948. Petitioners began filing their claims on March 28, 1942, according to allegations in their New York complaint, and continued to do so until June 15, 1948 (R. 84-85). They filed their original motion for leave to intervene on March 14, 1950. At no time has this respondent indicated that it believed in petitioners' theory of a corporate action to protect its so-called "non-enemy" stockholders, or that it intended to protect one group of its stockholders instead of affording protection to the corporation as a whole.

Is it not strange that the two petitioners who hurl these accusations at their corporation were not themselves "mislead" nor prevented "from protecting themselves" by a very early assertion of their claim and the timely filing of a 9(a) action? This attack upon the corporation will not withstand the simplest analysis. If the right is in the individuals, surely the corporation had no duty to awaken the stockholders; and if it is in the corporation, petitioners are not only sponsoring it but they feel sure that "no issue as to limitations arises in this case." (Pet. br. p. 44). So, of what do petitioners complain? They fear their derivative move will not survive by reason of its own strength, and hence they invoke an estoppel to prevent both the Government and this respondent from denying "that the corporation is the proper claimant." (Pet. br. p. 45). We have already pointed out that petitioners cannot sustain their charge against the corporation. They do not even suggest a reason why the Government is estopped.

CONCLUSION.

Having established in the foregoing that petitioners cannot intervene either derivatively or individually and for an alleged class in this respondent's statutory action under Section 9(a) of the Trading With the Enemy Act, the judgment of the court below is correct, and it should be affirmed.

Respectfully submitted,

ROGER J. WHITEFORD,
JOHN J. WILSON,
Attorneys for Respondent,
Societe Internationale, etc.

Of Counsel:
PEIDER KONZ

December 26, 1951

APPENDIX.

Trading With the Enemy Act, as Amended.

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then

such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 33. No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, by April 30, 1949, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.